OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 23, 2003

Ms. Claire Arenson
Assistant General Counsel
Texas Commission for Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2003-3493

Dear Ms. Arenson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181718.

The Texas Commission on Environmental Quality (the "commission") received a request for "the full text of the document from which Assistant General Counsel Claire Arenson read at [a March 19, 2003] meeting." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107 and 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted to this office by the requestor and the Natural Resources Division of the Office of the Attorney General (the "OAG"). *See* Gov't Code § 552.304.

We first address your request that this office find that the submitted "memorandum and discussions of other contested case items from the March 19, 2003 public meeting be withheld from disclosure as not within the scope of [the] request and exempted from disclosure under the Texas Public information Act." We note in this regard that the requestor, in a letter to this office, states that ". . . the document can not include information which is beyond the scope of the request, since the request is for the full text of the document." On this basis, and upon consideration of the fact that the requestor has specifically sought the *full text* of the document from which the commission attorney read, we find that the requestor seeks the entirety of the document that you have submitted to this office for review.

Therefore, we will address your arguments for withholding information from this document as a whole.

You claim the attorney-client and work product privileges under section 552.101 of the Government Code and the Texas Rules of Evidence and the Texas Rules of Civil Procedure. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." As we recently reaffirmed in Open Records Decision No. 676 (2002), section 552.101 does not encompass the Texas Rules of Evidence and Civil Procedure. *See* Open Records Decision No. 676 at 2 ("we find no authority to support a conclusion that the Texas Rules of Civil Procedure or the Texas Rules of Evidence are constitutional law, statutory law, or judicial decisions so as to fall within section 552.101's purview"). The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022 of the Government Code. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the information that is at issue here does not come within the scope of section 552.022. Therefore, *City of Georgetown* is not applicable in this instance. Accordingly, the city may not withhold the submitted information under section 552.101 of the Government Code or the Texas Rules of Evidence or the Texas Rules of Civil Procedure.

We will next address your argument under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition

depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that one of your job duties as General Counsel of the commission is to brief each commissioner individually and provide legal advice on matters set on the commission's public meetings calendar. You state that these communications are embodied in legal memoranda prepared by you and your legal staff that are provided to the commissioners prior to each public meeting. You state that these communications are not intended to be disclosed to third persons. Upon consideration of your arguments and our review of the submitted information, we agree that the submitted document is a protected attorney-client communication, and therefore, it is excepted from disclosure under section 552.107(1), with the following exceptions.

You do not dispute that, in fact, a commission attorney read from the submitted document at the public meeting in question.[1] Therefore, we must determine the extent to which the commission has waived the attorney-client privilege by voluntarily disclosing otherwise privileged information to the public. In Open Records Decision No. 412 (1984), this office stated:

> [w]e do not believe the attorney-client privilege may be invoked to protect from disclosure information which has already been voluntarily disclosed at a public meeting. Since we do not have all relevant details before us, we cannot determine the extent to which you have waived your right to assert the privilege in this instance. We therefore simply advise generally that any information contained in the requested letter and supplementary memoranda which has already been disclosed to the public, either in public board meetings or in some other manner, may not be withheld under the attorney-client privilege. Similarly, this information may not be withheld under [the predecessor to section 552.111], since voluntary disclosure of information removes that information from the ambit of this section as well.

Id. at 2. Similarly, we conclude that, to the extent the submitted document was read aloud at the March 19, 2003 public meeting, the protection of both sections 552.107(1) and

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[1]This office cannot resolve factual matters in the opinion process. You have not explained the extent to which these documents were read to the public. We therefore will discuss the applicability of the exceptions you raise as a matter of law without application to specific portions of the documents before us.

552.111[2] was waived, and those portions of the document that were publicly disclosed may not be withheld under these exceptions. For the information publicly disclosed, we will now address your argument under section 552.103.

Section 552.103 provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the information request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an

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[2]Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Under certain circumstances, governmental bodies may withhold attorney work product under section 552.111. *See* Open Records Decision No. 677 (2002).

attorney for a potential opposing party.[3] Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

Upon consideration of the arguments submitted to this office by the commission as well as by the OAG, we find that litigation was reasonably anticipated by the commission on the date of the request, and that the submitted information relating to the application by the San Marcos River Foundation ("SMRF") for a water rights permit is related to the litigation. We find, however, that any remaining information in the submitted document not pertaining to the SMRF permit which was disclosed at the public meeting is not related to the anticipated litigation and must be released to the requestor.

With regard to the submitted information pertaining to the SMRF permit, we note that, generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Accordingly, to the extent information from the submitted documents relating to the San Marcos River Foundation permit was publicly disclosed at the March 19, 2003 meeting, any such information may not now be withheld under section 552.103. *See* Open Records Decision No. 221 (1979) (official records of public proceedings of governmental body are among most open of records; doubtful whether litigation exception could ever be applied to except such records).

To summarize, any information in the submitted document that was publicly disclosed during the public meeting of the commission on March 19, 2003 must be released to the requestor. The remaining information may be withheld under section 552.107 of the Government Code.

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[3]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 181718

Enc. Submitted documents

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(w/o enclosures)